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CONTEMPORARY FORMS OF SLAVERY

Written statement*/ submitted by Japan Fellowship of Reconciliation, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[11 July 2000]

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*/ This written statement is issued, unedited, as received from the submitting non-governmental organization(s).

GE.00-14392

"Comfort women": Breaking the treaty defense

JAPAN'S TREATY DEFENSE

Responding to the Final Report on systematic rape, sexual slavery and slavery-like practices during armed conflict (E/CN.4/Sub.2/1998/13.) submitted by Ms Gay McDougall, the Japanese government delegation, said on August 14, 1998 at the Sub-Commission:

"The Government of Japan has sincerely addressed and settled the issues relating to the war in accordance with the San Francisco Peace Treaty, bilateral peace treaties and other relevant international agreements. ... However, we regret to say that the Government of Japan can not agree with the legal interpretations expressed in the appendix to this report nor can we accept its conclusion and recommendations which request the Japanese Government to take steps to provide redress rather than that which we are already undertaking."

In her report, the Special Rapporteur, Ms. McDougall already elaborated the logical reasons why the Japan's treaty defense was not convincing. JFOR warmly welcomes her legal interpretations as well as her conclusion and recommendations.

JFOR wishes to add another legal ground, which can break the Japan's treaty defense. One may understand the importance of this argument, as it relates to not only the "comfort women" issue but also other compensation claims in relation to the Second World War. JFOR simplifies the issue by confining itself within the right of civilians in relation to the VI Geneva Convention (1948). It must apply, however, to Prisoners of War as well[1]. JFOR hopes that this statement could assist not only the UN but also its member states such as the U.S.A., where its Congress and Courts are considering the same legal issue for the forced labor cases[2].

VICTIMS' RIGHTS TO COMPENSATION

Art. 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, on 18 October 1907 stipulates, "A belligerent party which violates the provisions of the said Regulations [i.e., the regulations of Land Warfare

annexed to the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." This guarantees individual victims the right to compensation according to the legal opinion made by Prof Frits Karlshoven[3]. This article of the 1907 Hague Convention was understood to have been customary international law and it was succeeded by Art. 91 of the Optional Protocol to the 1949 Geneva Conventions. Thus, the individual civilian victims violated by the Japanese Imperial Forces have the right to compensation against Japan.

VICTIMS IN CHINA

1. GENERAL BACKGROUND

Although the Japanese government argues as mentioned above, one should first examine each case by country basis. Let us take China for example.

First, it is absurd for Japan to say "sincerely addressed and settled the issue" in the case of China, to which it paid no compensation at all for all the wrong doings including military sexual slavery and massacres of tens of millions of civilians. What are the contents of that sincerity? One may become speechless, if he/she recalls the fact that Japan invaded Korea and China and took a big sum of war reparation from China, namely JP¥ 345 million (150% of the Japan's war cost) in 1895 on top of Taiwan as well as de facto control of Korea in the name of victory in war [4]. This money was not returned to China. Yet, Japan has been maintaining that no single yen should be paid to any Chinese. This denial itself must be considered as the original sin of Japan.

Second, China is not a Party to the San Francisco Peace Treaty. Therefore, it is not applicable to China.

Third, the Treaty of Peace between the Republic of China (Taiwan) and Japan of April 28, 1952 became null and void in accordance with the Sino-Japanese Joint Communiqué of September 29, 1972.

Fourth, there exists only one bilateral agreement relative to war claims, the Sino-Japanese Joint Communiqué of September 29, 1972. It includes no explicit provision, which waived the right of individual victims. According to Art. 5 of the said Joint Communiqué, " The government of the People's Republic of China declares that in the interest of the friendship between the Chinese and Japanese peoples, it renounce its demands for war reparation from Japan." The Japan Federation of Bar Associations made public its legal opinion that this provision did not waive the right to demand reparations for losses and damages sustained by Chinese nationals[5]. JFOR strongly supports this view.

PROHIBITION OF RELINQUISHMENT OF THE RIGHT OF VICTIMS OF WAR

The governments of the Parties to the IV Geneva Convention relative to the protection of civilians must be aware that the Convention, under Art. 148 and Art. 7, prohibits any agreements for the relinquishment of the rights of the protected persons.

First, Art. 148 of the IV Geneva Convention reads "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article." Therefore, if any military personnel commit war crimes or crimes against humanity, which are defined as grave breaches under Art. 147, the responsible Parties could not be allowed to absolve itself from any liabilities including responsibility for compensation due to the crimes and other Parties shall not be allowed to relinquish the rights of the victims without compensation from the responsible state.

Second, the second sentence of Art. 7 (1) of the IV Geneva Convention reads, "No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them." Therefore, the guarantee under Art. 148 cannot be adversely changed by any other international agreements.

These two articles clearly prohibited China and Japan to absolve Japan of the individual rights to compensation, in particular, if it comes to the issue of grave crimes. The conducts by the Japanese Imperial Forces against the Chinese women for sexual slavery is included in grave crimes in Art. 147, as slavery was the most serious crime under international law and it must constituted all or any of "torture", "inhuman treatment", "willfully causing great suffering" and "serious injury to body or health".

Therefore, China must have not waived the right to compensation of the individual victims under Art. 5 of the said Joint Communiqué, because it is unthinkable that China intentionally violated international law. Even if we assume the hypothetical case, where China and Japan tried to waive the right of individuals, that part of the Joint Communiqué did not take effect, as both China and Japan "shall not be allowed" to do so by Art. 147; and as "No special agreement shall adversely affect the situation of protected persons.".

THE GENEVA CONVENTIONS RELATIVE TO CHINA AND JAPAN

The Geneva Convention was concluded on August 12, 1949 and took effect on October 21, 1950. Japan acceded to the Geneva Convention on October 21, 1953 before the said communiqué. The Geneva Convention bound China in 1956 well before 1972 as well, as it was a Party to it. According to the International Committee of Red Cross[6], the status of China relative to the Geneva Conventions of 1949 is: Signature on 10.12.1949. Ratif.Accession on 28.12.1956.

CONCLUSION ON THE CHINESE VICTIMS

Therefore, China and Japan could not conclude any agreement to waive the right of individual victims under the said Joint Communiqué. Thus, the right to demand compensation against Japan of the individual military sexual slavery victims in China was never waived. Their right must exist even now.

THE VICTIMS IN OTHER COUNTRIES THAN CHINA

The second sentence of Art 26 of the San Francisco Peace Treaty (1951) is stipulates as follows:

"Should Japan make a peace settlement of war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty."

This could be understood as a "most favored nations" clause.

The 1972 Sino-Japanese Joint Communiqué is the peace and war claims settlement between Japan and China, which was concluded after the 1951 San Francisco Peace Treaty. In it, China never waived its nationals' individual rights to war claims against Japan.

Therefore, under Article 26, the victims of the Parties to the San Francisco Peace Treaty are entitled to similar treatment. Thus, Japan should give the same advantages, as if there had been no waiver of the rights of these individual victims.

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[1] See Articles 6 and 131 of the III Geneva Convention.

[2] The LA Times of June 28, 2000. The Japan Times of June 30, 2000.

[3] Legal opinion made by Prof Frits Kalshoven submitted in 1997 to the Tokyo District Court, in Fujita, Hisakazu, et al., ed., *War and the Rights of Individuals – Renaissance of Individual Compensation*, Nippon Hyoron-sha (1999). pp. 1-294.

[4] Kiyoshi Inoue, *Nihon no rekishi (ge)*, Iwanami shoten (1966). pp. 34-40.

[5] JFBA, "Supplementary Explanation of the Recommendation on the Issue of "comfort women"" (June 1995). pp. 10-12.

[6] SOURCE: *UNTS*, Vol.260, 1957, pp.438-444.